IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-300

THOMAS L. ANDREWS,
Petitioner,
v.
LOUISVILLE & NASHVILLE RAILROAD CO., and SEABOARD COASTLINE RAILROAD CO., as Lessees of the Properties known as GEORGIA RAILROAD,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE RESPONDENTS

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BRIEF FOR THE RESPONDENTS

I

OPINIONS OF THE COURTS BELOW

The Opinion of the United States District Court for the Northern District of Georgia, rendered on April 7, 1970, and an additional Order, after reconsideration on June 11, 1970, have not been reported. The Opinion of the United States Court of Appeals for the Fifth Circuit, rendered on April 26, 1971, rehearing denied, June 1, 1971, is reported at 441 F.2d 1222.

II

JURISDICTION

Jurisdiction of this Court has been invoked by the Appellant pursuant to 28 U.S.C., § 1254(1). A Petition for Certiorari was filed in this case on August 28, 1971, and Certiorari was granted on November 16, 1971. The Petition for Certiorari stated that the question presented was:

> "Must a discharged (or status equivalent thereto) union employee of a railroad company exhaust his administrative remedies under the Railway Labor Act as a prerequisite to maintaining an action for wrongful discharge under a common-law theory seeking damages." (Petition p. 2)

The Order granting Certiorari did not define the scope of the question.

III

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Appellant has stated that the appeal involves no Constitutional provisions. Appellee makes no contention as to any Constitutional questions. The statutes involved in this case are as follows:

> Railway Labor Act, § 1; § 1a; § 2, First, Second, Third, Sixth and Seventh; § 3, First and Second, 44 Stat. 577, as amended (45 U.S.C.A., § 151-53).

These Statutes are set forth in full in the Appendix to this Brief. Section 3 of the Railway Labor Act is set forth as it existed in 1965, and Public Law 89-456, §§ 1 and 2, 80 Stat. 208, amending that Section, is also set forth in full. The Railway Labor Act, § 3, was further amended in 1970, 84 Stat. 199; those amendments are not

material to the issues presented here but are set forth. See House Report No. 91-901; 91st Cong., 2d Session, 2 U.S.C.C.A.N. 2966 [1970]. Georgia Code Sections 20-1404, 1405, 1407, 1408, 1410 are illustrative of many state statutes and are set forth in full in the Appendix.

IV

QUESTION PRESENTED.

Is an action for breach of contract, based on the alleged wrongful discharge of a railroad employee, an action within the jurisdiction of any court, state or federal, when the employee concedes that he has not exhausted his administrative remedies under the Railway Labor Act?

V

STATEMENT OF THE CASE

The petitioner, Thomas L. Andrews, brought this action in the Superior Court of Fulton County, Georgia, a state court, alleging essentially that the Georgia Railroad had not allowed him to return to his normal job after an automobile injury, and, either additionally or alternatively, it is not clear which, alleged that the Railroad had wrongfully discharged the plaintiff. Andrews claimed lost wages, in the amount of $8,096.85 (representing wages due as of the date the Complaint was filed, April 2, 1969), and $100,000 for earnings which Andrews contended would be lost to him in the future. Andrews also asked for $25,000 in attorney's fees for his attorney. (App. 5)

The Railroad's Answer, in its critical part, stated that Andrews had not pursued the grievance procedures available to him under the collective bargaining contract applicable to him and further, had neither resorted to nor

exhausted the administrative remedies available to him under the Railway Labor Act. The Railroad further answered by denying that Andrews was medically fit to work, and denied that it had discharged him. The Railroad stated that Andrews was temporarily disqualified to work because of his physical condition, but that his seniority and all other rights were being preserved and if and when the company's doctor authorized his return to duty, he would be returned to duty with all of his employment rights unimpaired. (App. 9)

After removal to Federal Court on the grounds of diversity jurisdiction, the Railroad moved to dismiss the complaint on the ground that the employee had not shown that he had pursued any grievance procedures available to him under the collective bargaining contract, and further that he had not exhausted the Railway Labor Act's administrative remedies. (App. 10) The Court granted this motion as to the last ground, but on reconsideration, gave the employee leave to amend his complaint to specifically allege that he had exhausted his administrative remedies under the Railway Labor Act. (App. 17) No amendment was made, primarily because, as Andrews has indicated in his brief on the merits in this Court (p. 4), he could not allege that he had exhausted his administrative remedies.

No further Order was issued, and an appeal was taken to the United States Court of Appeals for the Fifth Circuit, which affirmed the judgment below (App. 50), subsequently denying a Motion for Rehearing.

No evidence was ever submitted by either side in the trial court, and, thus, a stark legal question on the pleadings is presented.

VI

SUMMARY OF ARGUMENT

Under *Moore v. Illinois Central Railroad Co.*, 312 U.S. 630 (1941), a discharged railroad employee aggrieved by the discharge may either (1) pursue his remedy under the administrative procedures established by an applicable collective bargaining agreement subject to the Railway Labor Act, and his right of review before the National Railroad Adjustment Board, or (2) if he accepts his discharge as final, bring an action at law in an appropriate state court for money damages if the state courts recognize such a claim.

Six years ago, in 1966, in *Walker v. Southern Ry.*, 385 U.S. 196, this Court indicated that the legal underpinning for *Moore* had been substantially eroded by subsequent decisions. However, the Court declined to reverse or limit *Moore* out of existence at that time, primarily because the administrative remedy was not really a fair equivalent to the judicial remedy allowed in *Moore*.

In 1966, Congress passed several amendments to the Railway Labor Act, providing for:

(1) equal judicial review of awards in favor of and against employees, and

(2) an expedited procedure for unclogging the processes of the National Railroad Adjustment Board (NRAB) so that the administrative remedy would be comparable in procedural efficacy to the judicial remedy.

Experience since 1966 has shown that both of these reforms have accomplished the objectives sought and thus there is no longer any reason to delay in making the rights of workers in the railroad industry comparable to

those of workers who have collective bargaining agreements within the sphere of the Labor Management Relations Act.

The major problem in 1966 lay in the fact that grievances under railroad labor contracts either had to be processed to a special adjustment board, established by agreement of both management and unions (which frequently could not be obtained) or were assigned to the NRAB. The NRAB was then hopelessly overloaded, one of its major Divisions having a seven and one-half year backlog of undecided cases. Since that time, many cases have been withdrawn from the NRAB to one of the special "public law" adjustment boards which since 1966 may now be established on demand of *either* management or the labor representative. New docketings in the overburdened Divisions have dropped sharply, as the "public law" boards have become the court of first resort. Realistic projections of case loads indicate that by June 30, 1973, little more than one year's backlog of work will remain in the *most* congested Division of the NRAB.

The only other serious question raised in 1966 in *Walker* was the comparability of the damages obtainable in a legal action and those obtainable via arbitration. Once it is firmly grasped that a suit for "wrongful discharge" is nothing more than a suit for breach of an employment contract (for absent the contract there are no rights at law of course), it can be readily perceived that there is no distinction between the remedies. Under general contract law, an employee may recover his back wages, plus interest (occasionally) and his attorney's fee (more rarely). The NRAB can give him back wages, interest, attorney's fees (which he doesn't even need), and further compensation for lost benefits on a "make whole" basis. Further, the NRAB can order him put back to work, on a complete "make whole" basis. At law, such a return to

work would completely negate any additional damages beyond those which had accrued at the time of trial. Thus, there is not a shred of difference between the remedies.

If affirmed, *Moore* possesses the ability to seriously undermine the Railway Labor Act. "Wrongful discharge" is not a separate cause of action, but merely an allegation of facts underlying a claim for total breach of contract. A discharge can legally arise from any of numerous possible breaches of an employment contract. Whether a breach is total or partial depends on the materiality of the clause in question. Materiality of a particular provision requires analysis, interpretation, and weighing of the entire collective bargaining contract, which this Court has repeatedly said is not a function of federal courts when labor relations boards, specially equipped and experienced, are available for that purpose. To now clearly affirm *Moore* is therefore to give any disgruntled employee the *option* of declaring

(a) his contract has been breached;

(b) the breach is material, and thus total;

(c) he is thus "wrongfully discharged"; and

(d) the federal court has jurisdiction of his claim.

There is no sound legal basis for carving out suits for "wrongful discharge", and allowing *jurisdiction* to depend on the ultimate facts proven. Such a concept is unworkable in practice as this case demonstrates, and will ultimately erode the "minor" dispute provisions of the Railway Labor Act. Alternatively, "*jurisdiction*" includes the jurisdiction to determine jurisdiction. Thus, merely pleading a "wrongful discharge" creates court jurisdiction, under *Moore*, and will clutter the courts with numerous matters clearly within the province of the NRAB.

Such a choice is not necessary. *Moore* was decided under an apparently erroneous impression of the legislative his-

tory of the Railway Labor Act. The court, in 1941, relied upon a 1926 House Committee Report to find that a spirit of "voluntariness" underlay the grievance procedure. In doing so, it apparently somehow overlooked the spirit of the *1934* Amendments to the Railway Labor Act which had very little voluntariness about them so far as grievances were concerned.

Thus *Moore,* probably decided on erroneous authority to begin with, has been untenably distinguished and isolated to its facts, while never having been expressly reconsidered. The administrative remedy is now fully adequate, and in accord with well established principles, this Court should now unequivocally declare that the primary and exclusive remedy for all railway labor contract grievances, whether called "discharges" or anything else, is administrative.

VII

ARGUMENT AND CITATION OF AUTHORITIES

A. Introduction.

Under *Moore v. Illinois Central Railroad Co.*, 312 U.S. 630, 83 L. Ed. 1089, 61 S.Ct. 754, decided in 1941, a discharged railroad employee aggrieved by the discharge may either (1) pursue his remedy under the administrative procedures established by an applicable collective bargaining agreement subject to the Railway Labor Act, and his right of review before the National Railroad Adjustment Board, or (2) if he accepts his discharge as final, bring an action at law in an appropriate state court for money damages if the state courts recognize such a claim. See also *Slocum v. Delaware, L. & W.R. Co.*, 339 U.S. 239, 244, 94 L. Ed. 795, 800, 70 S.Ct. 577, *Transcontinental and Western Air Inc. v. Koppal*, 345 U.S. 653, 97 L. Ed. 1325, 73 S.Ct. 906. The question in this case is whether those decisions should be overruled in light of *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 13 L. Ed. 2d 580, 85 S.Ct. 614, decided in 1965.

The above was the opening paragraph in *Walker v. Southern Ry.*, 385 U.S. 196, 17 L. Ed. 2d 294, 87 S.Ct. 365, decided in 1966. This Court concluded at that time that the answer to the question in that case, whether those decisions should be overruled, was no, but clearly indicated that at the appropriate time and in the appropriate case, that answer might well change. The lower courts in this case, as well as other state and federal courts, have concluded that there is no longer any reason to fail to honor both the spirit and the letter of the Railway Labor Act by continuing to allow a dissatisfied railroad employee to pursue his grievance in court rather than require him to submit his grievance to the binding arbitration processes of the National Railroad Adjustment Board.

This case comes to this Court almost naked of any supporting evidence, other than what is contained within the pleadings. It fairly appears from them, however, that Andrews is a railroad employee, of a class which is covered by a collective bargaining contract. During his period of employment, he was injured in an auto accident, and was out of work for some months. A dispute then arose as to whether or not he was physically fit to return to work, the railroad contending that he was not, and Andrews claiming that he was. Andrews, either alternatively, or cumulatively, claims he was in effect discharged from employment; the Railroad contends in its answer that he is being retained on the rolls and will resume his full seniority at such time as he is fit to return to work. It should be noted that this case thus presents a question not discussed in the cases previously before this Court dealing with this general area, but one which we believe graphically illustrates the pitfalls which lie ahead unless the previous decisions of this Court are clarified and modified. There is not only a dispute in the present case as to whether Andrews' "discharge" was wrongful, which question has generally been present in all of these cases, but there is a preliminary question of fact as to whether he has been discharged at all, and if so, in what manner. Was there an actual discharge or firing, by the Railroad, or was the "discharge" a legal conclusion that the employment contract has been totally breached by the railroad's refusal to allow the worker to resume a particular job, while nevertheless retaining him in employee status. This question and its significance will be elaborated further on, but it should be borne in mind at all times while considering the statutes, precedents and policy questions discussed here.

For any argument to be coherent, we believe a brief summary of the statutory and judicial lines of development in the area of whether or not an established admin-

istrative agency has exclusive, primary jurisdiction in labor grievance matters should be attempted. These two lines are (1) a brief history of the Railway Labor Act, and (2) a line of cases interpreting the Railway Labor Act, and certain cases involving statutes such as the Labor Management Relations Act.

B. Brief History of the Railway Labor Act.

The Railway Labor Act was first passed in 1926. The 1926 Act, the foundation of our present structure, provided for creation of various adjustment boards by voluntary agreement between carriers and workers, for the purpose of settling grievances under existing agreements. But this voluntary machinery proved unsatisfactory (See House Report No. 1944, 73rd Cong., 2d Session), and in 1934, Congress, with the support of both the unions and railroads, passed an amendment which directly created the National Railroad Adjustment Board composed of representatives of railroads and unions. The Act thus represented a considered effort on the part of Congress to provide effective and desirable administrative remedies for adjustment of railroad-employee disputes growing out of the interpretation of existing agreements. The Adjustment Board is well equipped to exercise its Congressionally imposed functions. Its members understand railroad problems and speak the railroad jargon. Long and varied experiences have added to the Board's initial qualifications. Precedents established by it, while not necessarily binding, provide opportunities for a desirable degree of uniformity in the interpretation of agreements throughout the nation's railroad systems.[1]

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[1] The above is generally taken from Slocum v. Delaware, 339 U.S. 239, at 242-43. See also the extended discussion in Elgin, J. & E. Ry. v. Burley, 325 U.S. 711, 89 L.Ed. 1886, 65 S.Ct. 1282 (1945) and Brotherhood of R.R. Trainmen v. Chicago R. & I. R.R., 353 U.S. 30, 35, 1 L.Ed. 2d 857, 77 S.Ct. 823 (1957).

However, the Adjustment Board slowly developed a case of bureaucratic hardening of the arteries, and the backlog of cases (and of dissatisfied employees) gradually accumulated until it reached near-fatal proportions. The only alternative to the Adjustment Board as a device for resolving employee grievances was likewise unsatisfactory. Section 3, Second, of the Railway Labor Act (in its post-1934 form) authorized carriers and unions to mutually agree to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in that Section. But if a carrier was unwilling, and many of them were, to set up such local boards, or to take part in any such boards that may have been established by other carriers, the employees of that carrier had no other alternative but to process their grievances through the National Railway Adjustment Board.

Finally, in 1966, Congress was forced to re-examine the functioning of the Railway Labor Act, and in particular, of the National Railroad Adjustment Board. It found that the Second and Fourth Divisions of the Board, which handled primarily the shopcraft, and maritime and supervisory employee unions, were well abreast of their duties, and employee grievances were receiving prompt attention and expeditious disposition. However, the First and Third divisions, dealing primarily with train and yard service, and the remaining non-operating personnel respectively, were hopelessly backlogged. The First Division had, according to Senate Report No. 1201, 89th Cong., 2d Session (2 U.S.C.C.A.N. 2285 [1966]), a backlog of some seven and a half years work, while the Third Division had a backlog of about three and half years work. The Senate Report stated baldly "Regardless of the merits of the contentions by either side [unions and management], it is obvious that the National Railroad Adjustment Board in the operation of the First and Third Divisions has failed."

Pursuant to that conclusion, Congress passed Public Law 89-456 in 1966, authorizing a speedy process for disposing of grievances under existing contracts, both for grievances newly arising, and for those which had then been languishing (or would in the future) in the breast of the National Railroad Adjustment Board for more than twelve months. The remedy was to provide that either a carrier or an employee representative could request of the other the establishment of a special board of adjustment, to which each would appoint one number, (or the National Mediation Board could appoint a member for a recalcitrant party), and they would seek to dispose of the issue. If they could not, they would seek to jointly agree upon a third neutral member. If they could not agree on the appointment of a third neutral member, either member after ten days could request the National Mediation Board to appoint a neutral. Each party pays his own member, and the neutral member is paid by the National Mediation Board. An award made by any special adjustment board is as fully enforceable in the courts as that made by a Division of the National Railroad Adjustment Board itself.

How well that remedy has worked may be seen by reviewing the Thirty-fifth and Thirty-seventh Annual Reports of the National Mediation Board, a U.S. Government Printing Office publication, which show the cases on hand before the National Railroad Adjustment Board at the beginning and end of each fiscal year from 1965 through 1971, and the number of cases disposed of during that year, both for the Board as a whole, and by Division.[2] A cumulative summary of Table 9—Cases Docketed and Disposed of by the National Railroad Adjustment Board,

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[2] This Court has previously considered this a reliable source of information in this area. See Slocum v. Delaware, 339 U.S. 239, 247, note 5 to opinion by Justice Reed; Brotherhood of Locomotive Engineers v. Louisville & N. R.R., 373 U.S. 33, 47, 10 L. Ed. 2d 172, 83 S.Ct. 1059 (1963), note 5 to Opinion by Justice Goldberg.

Fiscal Years 1935-71 Inclusive, from the Thirty-fifth and Thirty-seventh Annual Reports is incorporated in the Appendix to this Brief for the convenience of the Court. A more extended analysis of the table is made, *infra*.

That the new Public Law boards are disposing of disputes in rapid order can be shown by reference again to the Thirty-fifth, Thirty-sixth, and Thirty-seventh Annual Reports of the National Mediation Board. For the fiscal year ending June 30, 1969, 192 Public Law boards were established, 222 convened, and together they disposed of 1652 cases on their merits. (P. 47 of the Thirty-Fifth Annual Report) In the year following; 168 Public Law boards were established, and 258 convened. The report does not note how many disputes were disposed of, but the procedure during fiscal year 1969 suggests that each one was disposing of a half dozen or more cases. (P. 43 of the Thirty-Sixth Annual Report) For the year ending June 30, 1971, 188 Public Law boards were established and 226 convened. Again there are no specific figures on the number of disputes of which they disposed. (P. 51 of the Thirty-Seventh Annual Report)

That the new procedure is working to the satisfaction of both management and employees is suggested by House Report No. 91-901, 91st Cong., 2d Session, accompanying Public Law 91-234, a 1970 amendment to Section 3, First, of the Railway Labor Act. (2 U.S.C.A.N. 2966 [1970]) The House Report noted that the changes, being revisions in the organizational structure of the First Division of the National Railroad Adjustment Board made necessary by the merger of some of the operating unions, had been "agreed to by the affected unions, and by all affected railroads." It is not unreasonable to suggest that if there was still dissatisfaction over the functioning of the First Division, the *bete noir* of 1966, Public Law 91-234 might well have been a vehicle to have made still further substantive changes. That none were apparently even considered

would strongly suggest that there is no major dissatisfaction with the functioning of the First Division so far as the parties affected by it are concerned.

C. This Court's Prior Interpretations of the Railway Labor and Related Acts on the Point in Question.

(i) The earliest decision in this area is not well founded as it was based upon an inappropriate authority.

Turning next to the further decisions of this Court interpreting Section 3 of the Railway Labor Act, we must start with *Moore v. Illinois Central Railroad Co.*, 312 U.S. 630. It is obvious from reviewing the cases which cite that part of the *Moore* opinion which concerns this present case that that opinion has troubled this Court ever since it was issued. *Moore* has been explained, harmonized, limited, and, in fact, has had virtually everything done to it which a court may do except to be unequivocally and without reservation affirmed or overruled. *Moore* arose almost entirely on some questions occasioned by the then novel case of *Erie R.R. v. Tompkins*, 304 U.S. 64, 82 L. Ed. 1188, 58 S.Ct. 817 (1938), having to do with whether the Mississippi Statute of Limitations on either oral or written contracts would apply to a railway labor contract, or was the Federal court free to fashion its own statute of limitations or, alternatively, to "reconsider" in its role as a state court, a prior decision of the Supreme Court of Mississippi. These were novel and interesting questions in the immediate post-Erie period, and occupied by far the greater part of the decision of this Court and that of the court below (reported at 112 F.2d 959). The question of whether or not an employee, claiming damages growing out of an alleged wrongful discharge had to pursue a remedy before the National Railroad Adjustment Board as a prerequisite or as an alternative to bringing suit in

a state court was treated as clearly a secondary issue by both this Court and the Fifth Circuit Court of Appeals. The Circuit Court cited no authority, and little more reasoning, in simply declaring that such an action was not necessary. This Court came to a similar conclusion based essentially on only two factors.

The first was that Section 3(i) of the Railway Labor Act, as amended in 1934, provided that:

> "... disputes ... shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes *may* be referred by petition of the parties or by either of the parties to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing on the disputes." (Emphasis added.)

The word "may" had been substituted in the 1934 amendment for "shall" and this Court purely surmised that the difference

> "was not, we think, an indication of a change of policy, but was instead a clarification of the law's original purpose. For neither the original 1926 Act, nor the Act as amended in 1934, indicates that the machinery provided for settling disputes was based on a philosophy of legal compulsion. On the contrary, the legislative history of the Railway Labor Act shows a consistent purpose on the part of Congress to establish and maintain a system for peaceful adjustment and mediation voluntary in its nature."

The only source cited for this conclusion was House Report No. 328 of the 69th Congress, 1st Session, noted at 312 U.S. 636, n. 6.

Neither of these reasons bears close examination. The substitution of the word "may" for "shall" is susceptible

to at least *two* interpretations on its face. The first, the one chosen by this Court at that time, was that the employee was free to pick and choose between courts and Board as he saw fit. The second, which appears equally as likely, in the utter absence of any evidence, was merely a reflection of a desire on the part of Congress to make it absolutely clear that either the employee or the employer could abandon the dispute at any stage, and it need not automatically progress to the Adjustment Board upon the failure of the parties to adjust it among themselves. The earlier wording suggests that the parties could not let go of the dispute once they had begun it short of finding a solution to it. In other words, the substituted language, in effect, allowed one party to simply abandon the dispute without any implication, which would have been patently absurd, that the dispute had to be referred to the National Railroad Adjustment Board.[3]

Secondly, the conclusion that the Railway Labor Act was essentially a voluntary system was based upon the report which accompanied the *original 1926 Act*, not any report accompanying the 1934 amendments. The 1926 Act was, in fact, largely voluntary, but as this Court itself shortly after *Moore* noted, the voluntary nature of that Act in most of its significant features was its primary

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[3] As this Court shortly before had noted in an earlier Railway Labor Act case (Texas & N.O.R.R. v. Brotherhood of Ry. & Steamship Clerks, 281 U.S. 548, 568, 74 L.Ed. 1034, 50 S.Ct. 427 (1930), the meaning of a word in an Act of Congress may be gathered from the context. In this case, the context of the clause in question deals with disputes and their progression. Allowing a dispute to be peacefully abandoned or non-progressed certainly is an integral part of that context. It is a great deal closer in fact to the context of the clause than the idea that a party might choose to litigate in court, which was not even mentioned in Section 3 of the Act, as it then stood, until subsection (p) of Section 3, dealing with enforcement of final Board awards, was reached. On the basis of context, the suggestion offered here is a great deal more plausible than that reached by this Court in Moore. The change in emphasis from voluntary cooperation to compulsory settlement of "minor" dis-

weakness, and one of the purposes of the 1934 amendments was to make a great part of the Railway Labor Act mandatory and compulsory. See Section VI, B of this brief, *supra*.

The 1934 amendments need only to be read for the Court to perceive that whatever of a voluntary nature was left in the Act, was primarily in the major dispute field, while the minor dispute area was to be handled by compulsory processes. Thus, even if this Court had not already heavily circumscribed the original *Moore* decision, serious re-examination should certainly lead this Court to correct *Moore's* over-hasty ruling.

(ii) *SLOCUM V. DELAWARE*, the first in-depth analysis of the RLA and the NRAB, comes to an opposite conclusion than *MOORE*.

The next major case which considered the question raised in *Moore* was *Slocum v. Delaware, L.&W.R.R.*, 339 U.S. 239. This dispute arose because the Court of Appeals of New York, taking *Moore* at face value, concluded that *Moore* must mean that state courts had jurisdiction of actions arising out of a *breach* of a collective bargaining contract. This was inconsistent, however, with the spirit

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putes is more fully set out in Switchmen's Union of North America v. National Mediation Board, 320 U.S. 297, 300-303, 88 L.Ed. 61, 64 S.Ct. 95 (1943), and General Committee of Adjustment v. Missouri-K-T R.R., 320 U.S. 323, 327-33, 88 L.Ed. 76, 64 S.Ct. 146 (1943). Of particular interest in the last opinion is the note that "But it is apparent on the face of the Act that while Congress dealt with this problem subject comprehensively, it left the solution of only some of those problems to the courts or to administrative agencies. It entrusted large segments of this field to the voluntary processes of conciliation, mediation, and arbitration." 320 U.S. at 332. It is significant that arbitration was included as one of the "voluntary processes" which were encouraged by the Act; the contrast with this opinion and that in Moore that compulsory arbitration was inconsistent with the voluntary concept of the Act is striking.

expressed in *Order of Railway Conductors v. Pitney*, 326 U.S. 561, 90 L.Ed. 318, 66 S.Ct. 322 (1946), where this Court had held that Federal courts should not interpret such agreements prior to interpretation by the Adjustment Board. In *Slocum*, this Court held that since Federal courts should not interpret contracts, neither should State courts. In harmonizing that conclusion with *Moore*, the Court said in *Slocum*, as dicta, that an action for wrongful discharge, where the employee claimed damages for breach of contract, differed from any remedies which the Board had power to provide, and did not involve questions of future relations between the railroad and its other employees. Further the Court noted that any interpretation made by the Court in handling such a case, if it "must consider some provision of a collective bargaining agreement" would "of course have no binding effect on future interpretations by the Board." 399 U.S. at 244. Justice Reed, dissenting in *Slocum*, could not quite grasp how the distinction between "may" and "shall", found decisive in *Moore* in finding an indication of Congressional purpose sufficient to furnish a ground for holding that courts had concurrent primary jurisdiction, was no longer effective in *Slocum*. (Justice Reed did not dissent in *Pitney* for some reason, although his same reasoning would seem to have applied there as well.) Justice Reed might further have noted that there was nothing at all in the Act which distinguished discharge cases from any other grievance arising out of the contract, and yet the court had concluded in *Moore* that such disputes were litigable without requiring prior adjudication by the Adjustment Board.

(iii) A new rationale for *MOORE* is perceived in *KOPPAL*.

Obviously, this problem continued to trouble the Court for in *Transcontinental & Western Air, Inc. v. Koppal*, 345 U.S. 653 (1953) *Moore* was explained on an entirely new

ground which had never even been so much as mentioned in either the original decision or in *Pitney, Slocum,* or any other Railway Labor case. Treating both *Moore* and *Koppal* as state court actions brought by an employee on the ground of diversity of citizenship to recover damages from his employer for "wrongful discharge", this Court held that the laws of the state in which the Federal court was sitting determined the requirements of the cause of action, including the necessity of exhausting administrative remedies under the employment contract, the interpretation of the contract, and the measure of damages to be applied. The Court held that the *Moore* case proceeded because the law of Mississippi did not require exhaustion of any alternative administrative remedy, while the law of Missouri, from whence the *Koppal* case arose, did require such exhaustion. Thus, the question whether an employee and employer would resolve their problems within the context of the Railway Labor Act, or could proceed to litigate in the nearest state court was to be determined by the vagaries of state procedural and substantive law governing exhaustion of remedies, statutes of limitations, residence, and other such niceties. State courts would also be interpreting contracts under their own laws, as modified by whatever their own conflict of law theories were. In other words, federal courts when acting as state courts by virtue of diversity jurisdiction, would eventually be handling substantive Railway Labor Act matters in direct competition with the National Railroad Adjustment Board, so long as the claim was couched in terms of "wrongful discharge" under *Moore.*

(iv) **The new rationale is destroyed in *CENTRAL AIRLINES.***

Having declared that such suits would be based upon state procedural and substantive law, this Court proceeded to largely cut the ground out from under that theory by

ruling in *International Association of Machinists v. Central Airlines, Inc.*, 372 U.S. 682, 10 L. Ed. 2d 67, 83 S.Ct. 956 (1963), that when Section 204 of the Railway Labor Act (45 U.S.C.A., § 184), made it the duty of every air carrier and of its employees to establish a board of adjustment, whether the contract doing so was adequate to accomplish that purpose would be determined by Federal law as to any question of validity, interpretation, and enforceability. The Court noted that it would be

> "fatal to the goals of the Act if a contractual provision contrary to the Federal command were nevertheless enforced under State law or if a contract were struck down even though in furtherance of the Federal scheme." 372 U.S. at 691.

Further, the Court noted that

> "a union agreement made pursuant to the Railway Labor Act has, therefore, the imprimatur of the Federal law upon it." 372 U.S. at 692.

Further the Court noted that in 1934, the National Railroad Adjustment Board awards were made enforceable in the Federal courts, and awards under voluntary arbitration agreements were likewise made expressly enforceable under the statute. The absurdity of having such contracts interpreted differently in each and every state was noted by an approving quotation by the Court from the dissenting judge in the court below, found at 372 U.S. 691, note 15.

To be sure, the question before this Court in *Central Airlines* was whether or not an express statutory command affecting the airline industry had been adequately complied with by the contract entered into between the union and the airline. The requirement was that the parties establish a system board of adjustment, which would perform functions comparable to those performed by

the National Railroad Adjustment Board. It was not a contract governing the employee-employer relations of the airline as such which was in question, but the reasoning of the *Central Airlines* case is such that there would seem to be no adequate reason why such reasoning would not apply to the substance of the collective bargaining agreement itself.

If that be the case, then of course *Moore* no longer has any foundation whatsoever, for as stated in *Koppal, Moore* was an action based on state law allowed to proceed because Mississippi did not require exhaustion of remedies. But if *Central Airlines* means what it seems to say, then there is no longer any basis in state law for suing on a railway labor collective bargaining agreement and, thus, whether or not state law allows or requires exhaustion of administrative remedies is no longer a factor.

(v) A case arising under the Labor-Management Relations Act for severance pay holds exhaustion of grievance procedures is required.

The matter there rested until a case comparable to the present one, but in the area governed by Section 301(a) of the Labor-Management Relations Act (29 U.S.C., § 185(a)) was reached in *Republic Steel Corp. v. Maddox,* 379 U.S. 650 (1965). Maddox had sued his employer in an Alabama state court for severance pay, allegedly due him because of a layoff. Maddox contended that the employer's breach was such as to amount to a breach of the employment contract giving rise to the severance pay claim, and the court accepted his theory that state law would govern such a suit since there was no relationship between the parties which was within the cognizance of Federal labor law. The state court relied upon *Moore* and *Koppal* and analogized them to the industrial labor acts. This Court noted that those analogies were not

valid because *Moore* and *Koppal* had been based upon state contract law and diversity jurisdiction, but in the meantime, it had become established that Federal law now applied to collective bargaining agreements under the Labor-Management Relations Act and, would impliedly be held to apply to the substance of collective bargaining agreements under the Railway Labor Act, by virtue of the logical extension of the *Central Airlines* case. As the Court noted:

> ". . . a major underpinning for the continued validity of the *Moore* case in the field of the Railway Labor Act, and more importantly in the present context, for the extension of its rationale to suits under § 301(a) of the LMRA has been removed." 379 U.S. at 655.

The Court then noted that of course it would not overrule *Moore* under the Railway Labor Act, at least not until a case was presented under the Railway Labor Act

> "in which the various distinctive features of the administrative remedies provided by that Act can be appraised in context, e.g., the make-up of the Adjustment Board, the scope of review from monetary rewards, and the ability of the Board to give the same remedies as could be obtained by court suit." 379 U.S. at 657, note 14.

Maddox of course was but a logical extension of the Court's previous precedent shattering opinion in *Textile Workers' Union v. Lincoln Mills,* 353 U.S. 448, 1 L. Ed. 2d 972, 77 S.Ct. 912 (1957), holding that Section 301 of the Labor-Management Relations Act of 1947 did not merely authorize Federal courts to take jurisdiction of suits upon collective bargaining contracts, but authorized them also to fashion a body of Federal law for the enforcement of those collective bargaining agreements and further to compel enforcement of collective bargaining

agreement arbitration clauses. Justice Black pointed out in *Maddox* that *Moore* and *Maddox* were irreconcilably opposed, and then noted that while the Court had declined expressly to overrule *Moore* and *Koppal* in the *Maddox* case, it had "raised the overruling axe so high that its falling is just about as certain as the changing of the seasons." 379 U.S. at 667.

(vi) The overruling axe is stayed, temporarily, due to the congestion of the NRAB, while Congress repairs the law.

Taking those analyses of *Moore* at face value, the Fourth Circuit Court of Appeals in *Walker v. Southern Railway,* 385 U.S. 196, 17 L.Ed. 2d 294, 87 S.Ct. 365 (1966) proceeded to rule that *Moore* was no longer valid and a suit based upon an alleged improper discharge in violation of a railroad collective bargaining agreement could not be maintained in Federal Court. (The action had been brought there by reason of diversity of citizenship.) The Court noted that

> "provision for arbitration of a discharge grievance, a minor dispute, is not a matter of voluntary agreement under the Railway Labor Act; the Act compels the parties to arbitrate minor disputes before the National Board established under the Act." 385 U.S. at 198.

However, the Court further noted that at the time of Walker's alleged discharge and at the time he brought his lawsuit (apparently sometime after he was discharged in 1957, according to the Fourth Circuit decision at. 354 F.2d 950), the National Railroad Adjustment Board was not, in fact, an adequate administrative remedy. Without using those words, it is the only conclusion which may reasonably be drawn from the Court's discussion of the *Walker* decision. The Court specifically noted unfavorably the backlog of some seven and a half years in the First

Division and the fact that "railroad employees who have grievances sometimes have to wait as long as ten years or more before a decision is rendered [by the Board] on their claim." 385 U.S. at 198. A second defect in the Board's procedure was found to be that if an employee received an award in his favor from the Board, the railroad might obtain judicial review of the award by declining to comply with it. But, if the employee failed to receive an award in his favor, there was no means by which judicial review could be obtained by him. The Court further noted that Public Law 89-456, effective June 20, 1966, would drastically revise those procedures and hopefully alleviate those specific problems. However, those procedures were not available to Walker. As a result, the Court held:

> "The contrast between the administrative remedy before us in *Maddox* and that available to petitioner persuades us that we should not overrule those decisions [*Moore, Slocum,* and *Koppal*], in *his* case." [Emphasis added.] 385 U.S. at 199.

Justices Harlan, Stewart and White dissented on the ground that it was unsound for the Court to make the question whether exhaustion of remedies applied depend upon its judgment as to how it thought the Board was functioning. Be that as it may, we are now confronted with a case in which the new remedies were clearly available to the employee and he refused to even attempt to use them.

D. The New Administrative Remedies Are Fully Adequate to Protect Employer-Employee Interests and at the Same Time Reduce Labor Disputes in This Vital Industry.

That such remedies exist, and are speedy and efficacious may readily be seen by the fact that two other employees of an affiliate of the Georgia Railroad, who were, in fact, discharged on September 30, 1971 (and not merely

claiming to be so, as this plaintiff is), had their cases heard by a special board of adjustment on February 15 and 16, 1972, and may well either be back at work or have been definitively discharged by the time this case is argued. Beyond this rather isolated and probably inconclusive indication (which is not in the record), we have undisputed evidence that the Board is clearing its docket and can probably even now provide a quicker remedy than litigation. The Table in the Appendix to this Brief may be fairly summarized as follows:

(a) The Board as a whole went from a backlog of 6,559 cases as of July 1, 1964 to a backlog of 3,015 cases on June 30, 1971. The number of cases disposed of was hovering during this period at an average of approximately 1,600 cases per year. Thus, there was less than a two year backlog pending for the Board as a whole at the end of the last reporting year.

(b) For the First Division, the major source of complaint in 1966, the figures for the comparable periods went from 4,062 down to 2,054. Although there has been a wider range in the number of cases disposed of each year, that figure fluctuating from 482 to 986, the 665 cases disposed of in the year ending June 30, 1971, would not be far from average. Thus, the figures might suggest an approximately three year backlog in the First Division as of July 1, 1971, a substantial improvement over the seven and a half year backlog in 1966. We will come back to this in a moment.

(c) For the Second Division, which would handle Andrews' complaint, and which was never considered a problem, the backlog went from 270 to 137, with the cases disposed of per year averaging in the neighborhood of 225, from which we might conclude that there remained less than a one year backlog.

(d) For the Third Division, the backlog went from 2,196 to 779, with that Division disposing of approximately 750 cases per year during this period. Thus, the Third Division has gone from three and a half years on the average to approximately one year.

(e) For the Fourth Division, which likewise was not considered a particularly pressing problem, the backlog, nevertheless, went from 31 cases to 45 cases with the Division disposing of an average of 92 cases a year, suggesting approximately a half year accumulation.

The gross statistical figures might superficially suggest that the First Division still represents a relatively serious problem since its approximately three year accumulation is not far from the backlog of about three and a half years work which Congress found objectionable in the Third Division in 1966. However, the figures require some further analysis. It should be carefully noted that in the Second, Third and Fourth Divisions, which are now fairly current with their work, by far the greater majority of the cases that have been actually disposed of have been cases which have been decided and concluded one way or the other. Thus, in the Second Division and in the Fourth Division, which have always been more or less current with their work, the number of cases withdrawn from the Board's consideration has remained relatively constant during the period 1965 to 1971. At the same time, the number of cases *withdrawn* from the First Division has risen relatively sharply, from an average of 305 for 1965-1966 to 482 for the fiscal years 1967-1971. In 1967 alone, the first year under the 1966 amendment, 478 cases were withdrawn from the Division, many of these presumably being the cases about which the grievance was relatively serious, and which had been languishing within the Division for more than one year. The figures do not tell us whether the withdrawals were to a

Public Law Board or were simply dismissals, but these figures also strongly suggest that what may be happening in the First Division is that many cases are being disposed of simply by being called for hearing at which time the representative for the party pressing the grievance is concluding that it would rather not pursue the matter any further. Such a process occurs in trial courts as well, as nuisance, frivolous and trivial cases are abandoned as promptly as called for trial. However, in any court, more such cases are filed when there is little likelihood of being brought to trial at any time in the near future. Of course, undoubtedly, many cases are being withdrawn to the special boards.

Thus, it is certainly erroneous to judge from the size of the backlog alone that there are a vast number of serious cases still pending before any Division of the Board, including the First Division.

It should further be noted that the number of cases being docketed by the First Division has declined during every year except one since the passage of the 1966 amendment, with only 69 cases being docketed in fiscal year 1971, the fewest of any of the four Divisions. The rate of decrease in the First Division's backlog (approximately 440 cases per year for the last two years), if continued, suggests that by June 30, 1973, little more than one year from now, there will be not much more than one year's backlog remaining. Whether this rate of decrease will continue, of course, is uncertain, but it does not seem an unreasonable assumption.[4]

Indeed, whether the backlog now be one, two or even three years, it would not seem to be of such proportions that the statutory scheme should be utterly disregarded. Such delays are not uncommon in court cases. From filing

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[4] For a similar analysis of rate of decline in NRAB case load, see BLE v. Louisville & N. R.R., 373 U.S. 33, 10 L. Ed. 2d 172, 83 S. Ct. 1059 (1963).

the complaint to the order of dismissal in this case, it was more than 13 months, even though the motion to dismiss was promptly filed; had the case gone to trial, that time would be close to two years in the District Court alone at this time. Reports of the Director of the Administrative Office of the United States Courts show a one year backlog of criminal cases, and one to two year backlogs of civil cases almost uniformly in the various federal District Courts.

Recent additions to the ranks of District Judges have begun to ease that load, but in not even the most well-appointed district can a case for "wrongful discharge" be filed, answered, and brought to trial and disposed of within the three to four months that a similar case could be handled under the Public Law boards. This of course is not to say that all board cases are handled within that period of time. On a small railroad with a minimum number of disputes, particularly if the union involved does not have many members on that road, a special board might not (by the consent of both parties, however) be called until it had enough grievances to handle for the parties to wish to expend their own funds in compensation of the board members. However, the 1966 amendment specifically requires the carrier or the employee representative upon whom a request is made for a special board to join in an agreement establishing such a board within thirty days from the date such a request is made. Of course, there is no basis to believe that the present procedure encourages any extended stalling in having matters disposed of.

E. Possible Constitutional Infirmities in the Scope of Judicial Review of the Board's Actions Have Been Corrected.

In *Maddox*, and again in *Walker*, the Court questioned the scope of review from decisions of the NRAB. The 1966 amendment modified Section 3, First, (m) and (p) so as

to, first make all awards final and binding upon *both* parties to the dispute (repealing a provision which gave the railroad the right to have a review de novo of a monetary award against it), and secondly, clearly establishing that an award would be conclusive unless the board failed to adhere to the requirements of the Act itself or failed to confine itself to matters within the scope of the Board's jurisdiction or was tainted by fraud or corruption by any member of the Division making the order. Senate Report No. 1201 accompanying the 1966 amendments noted that: "'Arbitariness' or 'capriciousness' have not been specifically included as a ground for setting aside an award, the committee assuming that the Federal courts would have the power to decline to enforce an award which was actually irrefutably without foundation in reason or fact, "and the committee contends, that under this bill, the courts will have that power." In other words, the so-called "any evidence" rule applies in review of Board awards. In any event, the scope of review is now substantially the same insofar as awards of the National Railroad Adjustment Board are concerned as it is for numerous other administrative awards and orders.

F. **The Remedies Available to Employees Under Judicial and Administrative Processes Are Substantially Identical.**

The third question previously presented by this Court requires more extended analysis. This goes to the comparability of the remedies available via the administrative route and those available in a court of law. We may start by defining what the administrative route may provide at maximum. It is well established that a Board may award full back pay up to the time of hearing, occasionally with interest. It may require the employee to account for money he has earned in the interim, crediting the railroad with that sum, and it may further order that all of his benefits,

retirement, etc., be treated as having continued in full force and effect, while he was, in fact, off the payroll. Beyond that, it may order him reinstated, with full seniority, which might allow him to "roll" a lower ranking employee out of the job usurped in his absence. Where there is an underlying dispute about his medical condition, the board can appoint an impartial medical committee to investigate the employee's physical condition. In fact, all these things were done in a case considered by the Court in 1965, *Gunther v. San Diego & A.E. Ry.*, 382 U.S. 257, 15 L. Ed.2d 308, 86 S.Ct. 368 (1965). It might be noted further that although *Gunther* ruled that the ruling of the Board on the amount of back pay due the employee could not be final, under the law as it then stood, that situation has now been reversed by virtue of the 1966 amendments, as discussed in (F) above. Thus, a Board can now completely dispose of the matter and thus there is no longer any need for a two-step fact finding procedure. At least, this is the interpretation presently being followed by the lower courts. See *Brotherhood of R.R. Trainmen v. Denver & G.W.R.R.*, 370 F.2d 833 (10th Cir. 1966) and *Sweeney v. Florida E.C. Ry.*, 389 F.2d 113 (5th Cir. 1968).

In fact, *Sweeney* strongly suggests that under some circumstances, a board award might not compel an accounting for money earned while in a state of discharge. It further suggests (at 389 F.2d 114) that a Board award could well result in interest, costs, and attorneys fees. A similar conclusion (as to deduction for outside earnings), is strongly suggested by *Brotherhood of Locomotive Engineers v. Louisville & N. R.R.*, 373 U.S. 33. Certainly, had it been a closed question whether the railroad could deduct wages earned in the interim, the union would have been contending in that case that the railroad had no standing to obtain injunctive relief on the ground that it was in bad faith in resisting the board award and, thus, had no equitable standing to obtain injunctive relief under the Norris-LaGuardia Act, Section 8.

On the other hand, if an employee abandons an administrative remedy and commences a court action, what is the scope of his possible recovery? Before analyzing the question, there must be some serious discussion as to the nature of this action. The employee in this case has continued at every level to raise some concept of a common law right of employment. No citation of authority has even been offered to substantiate any such right nor can we locate any such right under the law, at least of Georgia. Nor is any Federal law creating a relationship of employer-employee between two specific parties known to this railroad, nor is any means by which one may acquire employee rights absent a specific employment contract known to this railroad. The only rights any employee has growing out of his discharge are such rights as may accrue to him under his contract of employment. In other words, no contract—no rights. Georgia Code, Ann., § 66-101 prescribes:

> "That wages are payable at a stipulated period raises the presumption that the hiring is for such period; but, if anything in the contract shall show that the hiring was for a lesser term, the mere reservation of wages for a lesser time will not control. *Indefinite hiring may be terminated by either party.*" (Emphasis added.)

See also *Lambert v. Georgia Power Co.*, 181 Ga. 624, 183 S.E. 814 (1936), which states in Headnote 1 (Headnotes by the court are substantative law in Georgia):

> "An employee under a contract of hiring, indefinite in its duration, may lawfully be discharged at the will of his employer. A discharge under such circumstances affords no cause of action for breach of contract."

In other words, unless there is a specific contract, there is no such thing as wrongful discharge. When an employee

claims a common law right of action in a state court, what he is really claiming is an action for breach of contract. As this Court noted in *Moore*, such an action stands on a legally distinguishable ground from an action for specific performance under a contract because in an action for breach, the employee contends the breach is total, and he is suing for the full value of the remainder of the contract. Under the law of Georgia,

> "Damages recoverable for a breach of contract are such as arise naturally according to the usual course of things, and such as the parties contemplated, when the contract was made, as the probable result of its breach." Ga. Code, Ann. § 20-1407.

While this statute is not a masterpiece of precision, case law has defined this concept more precisely:

> "In other words, the person injured is, so far as it is possible by a monetary award, to be placed in the position he would have been in had the contract been performed." Georgia Power Co. v. Fruit Growers Express Co., 55 Ga. App. 520, 527, 190 S.E. 669 (1932), quoted approvingly in Bennett v. Associated Food Stores, Inc., 118 Ga. App. 711, 165 S.E.2d 581 (1968).

Interest may be recovered under the law of Georgia, for a breach of an employment contract, Ansley v. Jordan, 81 Ga. 482 (1878), Ga. Code, Ann. § 20-1408. So may attorneys' fees be recovered when the defendant has been especially litigious or has acted in bad faith, or has caused the plaintiff unnecessary trouble and expense. Ga. Code, Ann. § 20-1404. On the other hand, a plaintiff in a suit based on contract can never recover exemplary damages, Ga. Code, Ann. § 20-1405, while he must lessen the damages "as far as is practicable by the use of ordinary care and diligence." Ga. Code, Ann. § 20-1410.

Where the damages are alleged to have arisen as the result of the breach of an employment contract, the one

injured can only recover his salary for the remainder of the period less the amount he received in other employments for work during that period. As a matter of fact, the rule in Georgia is that the jury must consider not only what he did earn, but what the employee might have earned by the exercise of reasonable diligence. *Georgia, F. & A. Ry. v. Parsons,* 12 Ga. App. 180, 76 S.E. 1063 (1913); *Waynesboro Planing Mill v. Hargrove,* 33 Ga. App. 684, 127 S.E. 665 (1925). Indeed, one old Georgia case strongly suggests that an offer to re-employ the employee would be an acceptable method of showing a mitigation or diminishment of damages. See *Johnson v. Gorman,* 30 Ga. 612 (1860).

At the same time, there may be no recovery in Georgia for damages accruing to a railroad employee for loss of his right of seniority and because of his having been blacklisted or boycotted by other railroad companies and, thus, being unable to obtain other railroad employment because such damages are not readily computable, nor could he recover for loss of rights in a group insurance policy which was not specifically a part of the employment contract. Of course, today, employees receive a great number of employee benefits many of which are not specifically incorporated in employee contracts, but are, nevertheless, one of their conditions of employment. See *Gary v. Central of Georgia Ry.,* 37 Ga. App. 744, 141 S.E. 819 (1928).

These Georgia cases, of course, are merely illustrative of well known and long standing general rules governing damages for breach of employment contracts. See generally Williston on Contracts (3rd ed.), §§1358-61A; McCormick on Damages (1935), §§158-163.

Of particular interest are the cases noted in these two standard sources dealing with re-employment by the same employer. (See Note 7 to §1359 in Williston and Notes 22

and 23 in §160 of McCormick). In *Flickema v. Henry Kraker Co.*, 252 Mich. 406, 233 N.W. 362 (1930), it was held to be error not to charge that if defendants offered to take plaintiff back into their employ and plaintiff refused, the plaintiff could not recover. Such a charge would have amounted to an absolute statement that being put back to work at the same wages and at the same position would completely eliminate any other recovery of damages. This decision was supported by a number of older cases, and is not at all belied by some equally hoary cases which held that where the discharge had been under circumstances which would tend to create an unpleasant situation for the employee if he should return, his refusal to accept an offer of re-employment would not be unreasonable and he would not lose his chance to recover damages thereby. See *Price v. Davis*, 187 Mo. App. 1, 173 S.W. 64 (1914) and *Levin v. Standard Fashion Co.*, 16 Daly 404, 11 N.Y.S. 706 (1890); and an annotation on this whole subject at 72 A.L.R. 1049 (1931).

The significance of this whole discussion is that if the maximum recovery which an employee can make for damages in the future (as seen from the time of trial) is no more than what he would make if the employer reinstated him at his original salary and under the original conditions, then the remedy which is available through the National Railroad Arbitration Board is completely comparable and precisely that which may be obtained in a court of law. That is to say, if the Board may put him back to work, he will obtain exactly what he could obtain from a lawsuit. The employee is not entitled as a matter of law to a chance at a windfall on the possibility that a jury may err in his favor. He is only entitled to be made whole and that is precisely what the National Railroad Arbitration Board can do for him.

G. The Limitations Subsequently Placed Upon the Decision in *MOORE* Are Untenable in Theory and Practice.

Beyond these practical problems, in which the court has expressed an interest, and the development of case law in this area, there are sound legal reasons why *Moore* must be disavowed. Perhaps the primary one lies in an error which was made initially in *Moore,* and has become more and more perceptible in the cases since *Moore.* A discharge is merely a fact which gives rise to a cause of action. The cause of action is nothing but one for breach of contract. Yet, the cases have continually referred to a "cause of action for wrongful discharge" as if this were a species of lawsuit which could be readily identified and assigned to the courts without any intrusion upon the administrative sphere. More than that, the cases have impliedly suggested that a clear dividing line may be drawn between "suits for wrongful discharge" and other types of grievances. From this implication has flowed a conclusion that "suits for wrongful discharge" may be assigned, at the will of the employee, to either the administrative or judicial route, while other grievances must be mandatorily assigned to the administrative route, in accord with *Slocum v. Delaware.* That these assumptions are incorrect may be readily dispelled by a review of some fundamental principles of contract law, and a look at some of the cases which have relied upon *Moore* to find jurisdiction to decide matters far beyond the rights of an employee who has been wrongfully discharged.

The key to this question lies in a recognition that the action is simply one for breach of contract. A breach of an employment contract may arise in many different ways short of the employee's immediate supervisor informing the employee that he has been fired. A total breach of an employment contract may result from substantially

less flagrant action. As stated so succinctly in Simpson on Contracts (1954):

> "Any unjustified failure to perform when performance is due is a breach of contract which entitles the injured party to damages. If the breach is slight or insubstantial, it is called a partial breach, for which plaintiff's damages are restricted to compensation for the defective performance. *If the breach is material, it is called a total breach, which gives to the injured party an election to substitute for his contractual rights the remedial right to damages for total failure of performance.*" (Emphasis added.) At p. 501.

Further, it is well established that even where a breach is so material as to constitute a total breach, the injured party is not bound to treat it as such but always has the election. See *Williston on Contracts* (3rd Ed.) § 1292. The determination as to the materiality of one particular clause in a labor union contract from which the claim arises can only be made, of course, by looking at the warp and woof of the whole contract. Thus in cases where something less than an outright "you're fired" has occurred, Federal Courts are going to find themselves weighing and interpreting not just one clause but entire collective bargaining agreements. Yet, this is precisely what this Court in *Slocum* and time after time since has held is beyond the power, if not the wisdom, of Federal District Courts to do.

That this is not a chimerical concern is demonstrated by the legion of cases to the effect that an employer may discharge an employee by actions other than formal words of discharge. See *e. g. Putnam v. Lower*, 236 F. 2d 561 (9th Cir. 1956), and *Seckinger v. Riley*, 99 Ga. App. 442, 108 S.E. 2d 761 (1959). The latter case graphically illustrates the problems lurking in this area: *Riley* holds

that the failure to pay wages when due is such a breach of the employment contract as entitles an employee to treat it as terminated and himself as discharged. A substantial number of all cases that go to the National Railroad Arbitration Board and special boards and the Public Law Boards are claims for nothing more than wages or compensation allegedly due under some clause of these highly complex contracts, usually arising out of a claim that some other craft performed the employee's job, or that the employee making the claim did some extra work, or for extra mileage or some such melange of fact, law, and "custom". Are all these claims to now be triable in federal and state courts on the theory that by refusing to pay them the employer breached the contract and the employee may consider it terminated?

The instant case is a good illustration of the pitfalls that lie ahead in the event *Moore* should be flatly affirmed. It will be recalled that the plaintiff here makes two contentions: First, that he was wrongfully discharged, and secondly, that he was not put back to work when his doctor said he was ready to go back to work. It would reasonably seem to appear that the first claim is really a claim that the railroad's failure to give him work when he was physically able to work is such a material breach of the employment contract that the employee is entitled to treat the entire contract as repudiated. Thus, we start down the long, slippery slope of letting a court decide, in a case where the man has not actually been discharged, as ordinary people use the term, of just how much of a breach of the employment contract may occur before the breach becomes so material that the employee can claim he has been "discharged".

Alternatively, at the end of the trial, if the Court finds the employee has not been discharged, is the Court to then decide that it wrongfully accepted jurisdiction to begin

with. Presumably it would have to do so, because if he has not been discharged, then the claim turns on whether he is or is not on some peculiar type of medical furlough list and whether he is rightfully or wrongfully on that list. There is nothing in *Moore* which states the court may adjudicate that matter, but a great deal in *Slocum* which says that is a matter solely for the National Railroad Arbitration Board. Indeed, that was precisely the factual point which *was* decided by the National Railroad Arbitration Board in *Gunther v. San Diego & A.E.Ry.*, 382 U.S. 257.

It is a well established proposition that a court always has jurisdiction to determine its jurisdiction. Thus, if *Moore* be good law, all an employee really need do is to allege, as this one has, that he has been wrongfully discharged (a fact) and he automatically has a claim justiciable in court. And it need not be emphasized too much that the burden of determining whether, in fact, he has been discharged may well be as great, if not greater, than the burden of determining if the discharge was wrongful. As the Georgia Supreme Court has said, "A court having jurisdiction does not have jurisdiction only of good causes but also of bad causes." That comment arose from a case in which that Court held that jurisdiction had been created by the plaintiff's pleading, not that he had been wrongfully discharged, but that he was about to suffer irreparable injury as a result of the railroad's intention to put into effect certain plans relating to (firemen's) firing assignments, which it was alleged were in violation of the collective bargaining agreement. *Central of Georgia Ry. v. Culpepper*, 209 Ga. 844, 76 S.E.2d 482 (1953). The Georgia Supreme Court looked beyond the facts in *Moore* to define the cause of action allowed therein, breach of contract, and then simply applied well established theories to the case before it in declaring that the suit was one primarily for the redress of a completed wrong or to prevent a wrong which would re-

sult in irreparable injury to the petitioner. Beyond that, the Georgia court looked to this Court as its source of law as to whether or not the National Railroad Adjustment Board, in particular, had exclusive primary jurisdiction of cases arising out of railway labor contracts. Rather than construct or apply a general Georgia law based on state practice and theory concerning exhaustion of administrative remedies on a broad basis, the Georgia court looked to the specific case of what this Court had said in *Moore* about the NRAB and held that no exhaustion was required. Thus, the underpinning of *Koppal* as a limitation on *Moore* was effectively destroyed, since *Koppal* stated that Federal courts should look to the State courts for a rule on exhaustion of administrative remedies. That obviously does little good if the state courts in turn will look to this Court's decision in *Moore* as to the status of the NRAB.

In summary on this point, the Court's attempt to limit jurisdiction of *Moore* type cases on a factual rather than cause of action basis has in reality succeeded in only confusing the Railway Labor picture and the time is ripe to end that confusion. It may well be argued that other grounds of federal jurisdiction are equally based on "facts" such as diversity of citizenship and the amount of damages sought. That may well be, but citizenship is a matter which can usually, except in the extraordinary case, be resolved in relatively early stages of litigation and the amount of damages sought is not an ultimate fact to be proven in the case but one determinable from the face of the pleadings. It would seem that to be logically consistent, if the Court cannot simply do away with *Moore*, at least it should amend it to declare that any cause of action which *alleges* a total breach of the employment contract is within the jurisdiction of the Federal court, rather than as now apparently let jurisdiction depend upon the ultimate facts proven.

H. **A Recent Decision by This Court Is Consistent With the Railroad's Position.**

The employee in this case has contended that *United States Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351, 27 L. Ed. 456, 91 S. Ct. 409 (1971) in some fashion supports his contentions. In that case, a seaman brought a wage claim in District Court, which assumed jurisdiction on the ground that the claim for seaman's wages and an additional penalty was based on an express federal statute, 46 U.S.C. § 596, and that the action was thus within the federal court's admiralty or maritime jurisdiction. However, the seaman was also the beneficiary of a collective bargaining contract which provided a grievance procedure and for ultimate arbitration of any disputes. The court held that Section 301 of the LMRA, *Lincoln Mills* and *Maddox* did not cumulatively destroy the seaman's right to judicial redress for his wage claim, primarily on the ground that the seaman's wage claims were protected by an "express judicial remedy created by § 596". 400 U.S. at 357.

It may be useful to consider the other opinions. Justice Harlan, who joined in the majority opinion, concurred and noted further that "the mere provision by Federal statute of a judicial forum for enforcement of the wage claims of a sub-class of workers [does not] forego application of the arbitration principles of [*Lincoln Mills* and *Maddox*]; nor do I understand the Court's opinion today to so hold." 400 U.S. at 358. Justice Harlan, however, in accord with his dissenting reasoning in *Walker*, explained his vote with the majority in *Arguelles* on the ground that Arguelles' suit, unlike Maddox' claim, was not simply "on the contract"; Arguelles was also seeking a statutory claim for refusal or neglect to pay his wages. This, of course, was purely a statutory right and under those circumstances the arbitral remedy was not compre-

hensive. Justice Harlan further found a Congressional policy favoring promptness in the payment of seamen's wages. Under these circumstances, it was the least desirable of all solutions to create a necessity for proceeding in both the arbitral and judicial forums to obtain a complete recovery, and thus the legislative policy could best be reconciled by giving the seaman an option to choose between the forums when he stated a claim under both the contract and under 46 U.S.C. § 596.

Justices White, Brennan, Stewart and Marshall, dissented on the ground that, essentially, there were substantial factual questions underlying the seaman's claim, which could only be resolved by reference to the collective bargaining agreement. They noted that those questions were particularly within the competence of the established grievance procedure of the collective bargaining agreements, being all questions of fact or interpretations of various provisions of the agreement.

Considering the majority opinion, Justice Harlan's concurrence, and the dissenting opinion together, it would appear that but for the sole fact that the seaman was pursuing an additional statutory penalty, there could as well have been at least a five-four majority in favor of relegating the seaman to an exhaustion of the grievance and arbitration procedures under his contract, even though a federal statute expressly protected his wage claims, *per se*. Thus, *Arguelles* becomes very shaky authority indeed for the plaintiff here to rely upon, or even to mention, as it seems in its reasoning to actually support the railroad's position.

I. Some Miscellaneous Considerations Should Be Laid to Rest.

We should deal with some considerations that have been raised by this Court in previous opinions in this area. In *Moore*, the Circuit Court below stated that Moore's claim

essentially rested upon the interpretation and application of the collective bargaining contract of an interstate railroad with its employees. That question was not discussed when this Court ruled in *Moore;* however, in *Slocum,* this Court's retrospective analysis of *Moore* noted that an action "for wrongful discharge" did *not* involve questions of future relations between the railroad and its other employees, and the Court's interpretation would "of course have no binding effect on future interpretations by the Board." 339 U.S. at 244. Although this statement was repeated and quoted verbatim in *Koppal,* restatements alone neither provide this dicta with any satisfying reasoning nor enhance its authority. Indeed, only four years after *Koppal,* in *Lincoln Mills,* this Court was already questioning those facets of the decisions of *Moore* and *Koppal.* See 353 U.S. at 459, note 9.

Neither of these statements is really well founded. It somewhat beggars the imagination to understand how a decision by a Federal court, in the event it had to determine the significance or meaning of a part of the collective bargaining contract, and did so (interpretation of contracts being a normal function of courts), would not make a decision that would be persuasive if not binding on the NRAB; particularly would this be so in the event that decision by a District Court were appealed to a Circuit Court, and ultimately to this Court. Does this Court mean that its decisions as to interpretations of contracts in the collective bargaining area would not be binding on the National Railroad Arbitration Board in the event it reconsidered the same contract in another case. We would hardly think that that is a tenable position.

The second part of the *Slocum* dictum, namely that questions arising in the course of litigation over a wrongful discharge would not involve questions of future relations between the railroad and its other employees is equally dubious. Obviously, any interpretation of a con-

tract, whether arising in the abstract, over the rights of one employee, or over the rights of all, is going to become a part of that contract. And if it becomes a part of that contract, it, of course, *is* going to affect the future relations between the remaining employees and the employer. In the case at hand, for instance, there is apparently a dispute over whether the employee is in fact discharged, or whether he is on an extended furlough list due to his physical condition. Presumably, if tried, the plaintiff will be contending that he has not been properly put on that list and thus he must have been discharged. Alternatively, there will be a dispute about the propriety and evaluation of the various medical examinations that seem to have taken place. These questions can only be resolved by reference to the contract, and, when resolved, they will form part of the "common law" of that contract. Arguelles could as well have been a railway worker, claiming a total breach of his contract for failure to pay wages; could his claim be settled without interpreting and applying an apparently disputed part of the contract?

Beyond this, there is a further serious problem ahead. What law is to be applied to the interpretation of these contracts? Under *Central Airlines,* and the theory of *Lincoln Mills,* such collective bargaining contracts are to be interpreted by a sort of Federal common law of collective bargaining contracts. The only place such law now exists is in the various reports of the NRAB. If the courts are not to follow these but are to create their own common law, we have the obvious probability of generating two different lines of authority and two different interpretations of the same contract, giving rise to forum shopping of the worst nature. Yet, to avoid this, are the courts merely to follow the interpretations of the administrative agencies? If so, why not let the administrative agency which has the admitted expertise in this area handle the problem in the first place. Clearly the suggestion that dis-

charge suits do not involve future relations between employer and employee does not hold water. Even if it were rationally correct, that is not the policy which this Court applied in *Maddox*. In that case it will be recalled, this Court held that where the dispute was one over severance pay, and the company had apparently closed its operation and presumably there were no employees left in that bargaining unit, arbitration would still be a required prerequisite to judicial intervention. The Court noted:

> "Only in the situation in which no employees represented by the union remain employed, as would be the case with a final and permanent plant shutdown, is there no possibility of a work stoppage resulting from a severance-pay claim." 379 U.S. at 650.

The congressional policy underpinning the Railway Labor Act, namely the prevention of unnecessary work stoppages, is, if anything, even stronger in that case than with reference to the non-railway labor field. Thus, if the potential of a dispute to create unnecessary work stoppages is any criterion, disputes over severance pay and discharges (which are practically inseparable) clearly ought to be under the umbrella of compulsory arbitration, rather than allowing them to be the subject of litigation at will.

There is another major reason why it would be inappropriate to continue to allow such suits as this to be brought in federal court. This Court has on more than one occasion questioned and inferentially criticized the one-sided review of decisions of the Adjustment Board allowed prior to the 1966 amendments. Prior to that time, the railroad could obtain a review where there was a money award made to the employee, but the employee could not obtain a review of the failure of the Board to grant him a money award. This criticism was fair and correct, and Congress rectified it in 1966. But it has a corrolary to the present issue. If an employee is to be allowed to proceed

to court at his option, in the event he wishes to claim he has been discharged, is not a railroad entitled to initiate judicial proceedings seeking a declaratory judgment of its right to fire one or more particular employees? And if so, how is the employee to defend his rights? Is he to be forced to hire an attorney, or is the union treasury to be burdened with this expense? (This could be a unique form of punishment, in certain situations.) If the railroad is first to the courthouse, does this divest the employee of his grievance and arbitration procedures on the ground that the matter is presently before the alternative forum? It is difficult to conceive of a more enervating illness which could be inflicted upon the Railway Labor Act than to encourage such a procedure. Yet, that would seem to be a necessary implication of an outright affirmance of *Moore*. As a practical matter, railroad counsel have at least since Lincoln Mills, in 1957, considered *Moore* to be on extremely shaky grounds. An outright affirmance of *Moore* at this point might well lead to some major reconsideration of the appropriate procedures to be followed when an employee is sought to be discharged. A declaratory judgment procedure might be particularly desirable since the railroad could keep an employee on the job and only lose its legal fees if it lost, while under the present administrative procedure, it might have to pay three to six months back wages for time not worked. Of course, the savings are not substantial on a single employee basis, but they accumulate rapidly if the rights of several employees can be adjudicated at once.

This railroad does not suggest we would follow any such practice, but the Court must consider the logical extension of its rulings in the light of the internecine warfare in this industry for the last hundred years. Had this case arisen as the result of this railroad's having filed a declaratory judgment action seeking clarification of its right to discharge a half-dozen employees, the true

shakiness of the foundations of *Moore* would be readily apparent.

Finally, this Court has suggested on occasion that a union would not necessarily be interested in processing a discharge grievance for an employee who has been discharged and who is not on hand to spur the union on. This argument could as well have been made in *Pennsylvania R. R. v. Day*, 360 U.S. 548, 3 L. Ed. 2d 1422, 70 S. Ct. 1322 (1959), dealing with whether or not the board had exclusive primary jurisdiction of the claim of a retired employee for extra compensation he had earned while employed. The majority of this Court held that the Board did have exclusive primary jurisdiction, and that the retired employee could not press his claim judicially at his option. Certainly that question, if it were a serious one, could have been applicable there to allow him to litigate, for a retired employee is, so far as being in day-to-day touch with his union officers and being in any position to exert pressure on them, in exactly the same status as an employee who has been discharged. Beyond this, the case is actually stronger in the situation in which many railroad workers find themselves. In the railroad industry, there are numerous unions competing for the employee dues dollar. The Thirty-Seventh Annual Report of the National Mediation Board (Table 10) shows the effect of this competition. Among at least the engineers, firemen and hostlers, yardmasters, dispatchers, signalmen, mechanical foremen and supervisors, dining room stewards, dining car cooks and waiters, carmen and coach cleaners, not to mention the various airline and maritime crafts, there is obviously substantial competition between different unions within the same craft. An employee already signed up by a given union is a bird in the hand; his replacement's allegiance is a bird in the bush. The situation is, of course, different with the typical industrial union, which is not normally engaged in a fight for em-

ployee allegiance except in the purely open shop states. Under union and agency shop agreements, all employees will become union members (or pay the equivalent dues) and the identity of the particular employee is of no great significance. Yet, if industrial unions can be entrusted to pursue discharge claims for their members, as they can under *Maddox,* it makes little sense not to assume that railway unions will be at least as diligent on behalf of their members.

The question has occasionally been raised by this Court, most commonly in dissenting opinions having to do with the functioning of the National Railroad Adjustment Board, as to the remedy for the employee who is unable to get his union to prosecute his case vigorously. It should be noted that all the Court has ruled in the non-Railway Act cases is that the employee is required to *attempt* to exhaust his administrative remedies before he is allowed to litigate the matter. See *Republic Steel Corp. v. Maddox,* 379 U.S. 650 at 668-669. However, under the Railway Labor Act, an individual employee is specifically authorized to prosecute his own grievance before the National Railr. Adjustment Board, whether his union wishes to represent him or not. In fact, during the fiscal year ending June 30, 1971, the First Division of the Board docketed sixteen cases filed by individuals, and only 53 by unions. For the Second Division, the figures were 11 and 151, respectively, while the figures are not entirely clear for the Third and Fourth Divisions. Thirty-Seventh Annual Report of the National Mediation Board, pp. 70, 71, 74, 76. To be sure, it does not appear that an individual employee is entitled to have a special board convened to hear his solitary grievance under the terms of the 1966 amendment. That right is apparently only held by the representative of the craft or class of employees. Section 3, Second, as amended in 1966. However, when it is considered that each party to the dispute pays his own board member, it is not unreason-

able for Congress to have limited the authority to convene a special board to those who are presumably responsible and able to pay for them, at least so long as the employee is able to pursue his remedy before the NRAB without cost to himself. Should the Board unduly delay in handling a particular individual's request, who does not have the remedy of a special board of adjustment, it would appear that in line with previous holdings he has *attempted* to use the administrative remedy and it has proved unavailing in his case. However, at the rate at which even the First Division is catching up on its backlog, it would seem that there would be few occasions when a court would realistically be justified in ruling that the administrative remedy was unreasonably delayed in a particular case. Delay is a feature of all forums, and particular cases may sometimes be long drawn out in court as well. The question before this Court, one would think, would be whether the system as a whole is designed to function with reasonable efficiency in handling and disposing of grievances. There is no evidence to suggest that it is not doing exactly that at this time.

VIII

CONCLUSION

There seems to be little point in rehashing the numerous cases in which this Court has indicated its faith in the procedures and wisdom of the National Railroad Adjustment Board in handling every other type of grievance except discharge matters. Those same conclusions could as well be drawn and applied to grievances arising out of discharges. The only question is whether the courts should be made available as an alternate primary forum. In conclusion and by way of summary, the railroad here contends that *Moore* was decided prior to the clear delineation and in-depth investigation of the balance between

voluntary and compulsory compliance with the Railway Labor Act's procedures made in *Slocum*. Upon the first detailed examination of the Railway Labor Act, in *Slocum*, this Court attempted to limit *Moore* by describing *Moore* as a suit for "wrongful discharge". In *Koppal*, this Court again limited *Moore* by constructing a retrospective rationale that *Moore* was decided as a matter of state law and under the state law of Mississippi no exhaustion of alternative primary remedies was required. However, *Central Airlines* cut the ground out from under that distinction by holding in effect that contracts under the Railway Labor Act were now to be determined by Federal substantive law, and not state law. Thus contracts under the Railway Labor Act were to be interpreted in the future as were contracts under the Labor-Management Relations Act, by reference to a Federal common-law of collective bargaining contracts. *Maddox* declared that for claims arising out of collective bargaining agreements under the Labor-Management Relations Act, an employee who had been discharged could not sue his employer for his severance pay, a right clearly growing out of his discharge and based on the contract, because he had not exhausted the grievance procedures provided by the agreement. In *Walker v. Southern Railway Company*, this Court indicated that but for certain deficiencies in the operation of the National Railroad Adjustment Board, it would probably have overruled *Moore* in 1966. Those deficiencies have since been solved and the Act modified to provide for equal review for both sides. The plaintiff here has never attempted to pursue his remedies under the Act, although there is no question but that they are fully available to him.[1] Should plaintiff wish to pursue his admin-

[1] The railroad is aware that hard cases make bad law, and would like to point out that whatever the contract may call for in the way of time limits for challenging various decisions, etc., the railroad has contended that it will put the employee back to work whenever he is physically able. Each new refusal to

istrative remedies, there is no indication he could not obtain a Public Law board able to dispose of this case in a matter of months, or if he wishes to pursue the original remedy before the NRAB, he should be able to obtain a hearing in a reasonably prompt order. This is the procedure followed for every other kind of grievance, and there seems to be no sound reason now for requiring every other kind of dispute arising under a collective bargaining agreement, whether under LMRA or the Railway Labor Act to be initially disposed of in an administrative tribunal, except for the limited case when an employee under the Railway Labor Act *claims* he has been wrongfully discharged.

An action for "wrongful discharge" is nothing more than an action for total breach of contract, and this Court should either rule that all such actions are within the primary exclusive jurisdiction of the Board, or that all actions for total breach of the employment contract may be tried alternatively in court. To merely state that proposition is to show its undesirability, for jurisdiction of all actions for total breach includes jurisdiction to determine jurisdiction, and a court will thus have jurisdiction to determine if a total breach has occurred; where a breach of the employment contract may arise in many cases falling far short of an outright discharge, this is inevitably going to plunge the federal courts into the very business of interpreting and analyzing collective bargaining agreements that this Court has found so distasteful in *Slocum* and all of its progeny.

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put the employee back to work would constitute a new starting point from which the contract grievance procedure might be begun. Under the circumstances, of course, the railroad being estopped to contend that he was discharged, the plaintiff still has available to him the full range of contract and statutory administrative remedies whenever he wishes to use them. Thus, the plaintiff has suffered no disadvantage from having pursued this route in the event this Court should now decide to reverse its position in Moore.

Under these circumstances, Congressional policy indicating the clear preference for the peaceful and compulsory resolution of disputes arising under collective bargaining agreements should be adhered to, and plaintiff allowed to pursue his administrative remedy exclusively. The original foundations of the *Moore* decision having been totally eroded by *Koppal* and *Central Airlines,* it is not even necessary to explicitly reverse *Moore;. Moore* can be interpreted out of existence in light of *Maddox* and *Slocum* and there seems to be no serious reason why it is not time to take that step and end this useless but provocative anomaly, once and for all.

Respectfully submitted

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